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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ELECTRONIC PLATING COMPANY, ROBERT PORCELLI and HARSHAD PATEL,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Illinois Appellate Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fourth Amendment to the United States Constitution provides that

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

The Circuit Court of Cook County, Illinois found that multiple warrantless searches of petitioners' private property violated the Fourth Amendment, because the State relied upon a pretext of administrative authority to conduct a criminal investigation. Disagreeing with the trial court, with the United States Supreme Court and with the courts of at least three sister states, the Illinois appellate court reversed, condoning the State's pretextual searches and holding that the State's actions did not violate the Fourth Amendment.

The question presented for review is: Whether *California v. Greenwood* creates an exception to the Fourth Amendment prohibition against pretextual, warrantless searches and seizures of evidence proscribed by *New York v. Burger*.

STATEMENT PURSUANT TO RULE 29.6

Electronic Plating Company, an Illinois corporation, has no parent companies or subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

I. THE DECISION BELOW IS AT ODDS WITH FOURTH AMENDMENT DECISIONS IN THREE OTHER STATES AND WILL LEAD TO INCONSISTENT APPLICATION OF A CONSTITUTIONALLY SECURED RIGHT 7

A. The Fourth Amendment Analysis Followed by the Illinois Appellate Court Conflicts with Fourth Amendment Analysis in Three Other States 8

B. Federal Interpretation of Analogous Fourth Amendment Issues is Consistent with the Trial Court's Finding 13

II. THE APPELLATE COURT'S FOURTH AMENDMENT ANALYSIS MISCONSTRUED THE NATURE OF THE STATE'S "SEIZURE" AND THE PETITIONERS' PRIVACY INTEREST IN THE LOCATION "SEARCHED" 14

III. *CALIFORNIA v. GREENWOOD* IS NOT AN "EXCEPTION" TO THE *BURGER* DOCTRINE 17

CONCLUSION 20

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

Cases PAGE(S)

Arizona v. Hicks,
480 U.S. 321 (1987) 14

California v. Greenwood,
486 U.S. 35 (1988) 6, 9, 11, 18

Commonwealth v. Krisco Corp.,
421 Mass. 37, 653 N.E.2d 579 (1995) 10, 11

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 14

Horton v. California,
496 U.S. 128 (1990) 13

Katz v. United States,
389 U.S. 347 (1967) 7, 8

Maryland v. Bacon,
472 U.S. 463 (1985) 15

Michigan v. Tyler,
436 U.S. 499 (1978) 6, 8

New York v. Burger,
482 U.S. 691 (1987) 6, 8

New York v. deWit,
No. 88-38 slip op. (N.Y. County Ct.,
Feb. 16, 1989), *aff'd* 550 N.Y.S.2d
820, 156 A.2d 973 ..... 9, 10

Ohio v. Denune,
82 Ohio App. 3d 497,
612 N.E.2d 768 (1992) 11, 12

People v. Electronic Plating Company, et al.,
291 Ill. App. 3d 328, 683
N.E.2d 465 (1st Dist. 1997) 1

Rawlings v. Kentucky,
448 U.S. 98 (1980) 15

Soldal v. Cook County,
506 U.S. 56 (1992) 14

United States v. Charr,
No. 96-2316, 1998 WL 51293, at *9,
n. 6 (6th Cir., February 11, 1998) 14

United States v. Jacobsen,
466 U.S. 109 (1984) 15

Constitutional Provision and Statute

U.S. Const. amend. IV ..... i, 2

28 U.S.C. § 1257(a) 1

PETITION FOR WRIT OF CERTIORARI

Petitioners, Electronic Plating Company, Robert Porcelli and Harshad Patel, respectfully petition for a writ of certiorari to review the judgment and opinion of the Illinois appellate court in this case.

OPINIONS BELOW

The Illinois Supreme Court denied petitioners' Petition for Leave to Appeal on December 3, 1997. The order denying the petition is reprinted in the Appendix at page A25. The opinion of the Illinois appellate court is reported at *People v. Electronic Plating Co., et al.*, 291 Ill. App. 3d 328, 683 N.E.2d 465 (1st Dist. 1997), and is reprinted in the Appendix at pages A1-A12. The memorandum opinion of the Circuit Court of Cook County, Illinois is reprinted in the Appendix at pages A13-A24.

JURISDICTION

The order denying petitioners' Petition for Leave to Appeal to the Illinois Supreme Court was entered on December 3, 1997. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On June 26, 1992, the Metropolitan Water Reclamation District of Greater Chicago ("MWRD") received an anonymous tip concerning the Electronic Plating Company ("EPC") facility located in Cicero, Illinois. EPC operates a metal electroplating business. EPC's operation generates waste, some of which is shipped for disposal off-site, and some of which is lawfully disposed into the sewer. Prior to discharging its waste into the sewer, EPC treats the waste to remove contaminants. The anonymous tip alleged that EPC had installed an underground pipe to bypass the wastewater treatment process at its facility and dispose of waste into the sewer without first removing contaminants. Five days after sending the tip, the informant sent the MWRD a sketch. App. at A26. This sketch showed the location of the supposed bypass pipe within EPC's building. The tip and sketch were routed to the supervisor of MWRD's North Central Section. App. at A2, 13.

Three months later, the same supervisor of MWRD's North Central Section sent MWRD Agent James Waclawik to the EPC building on a Saturday, without a warrant, to search the facility. On this particular Saturday,

September 26, 1992, and during subsequent searches, Agent Waclawik took a copy of the tip and sketch with him. Agent Waclawik testified that a purpose of his first visit to EPC was to corroborate the anonymous tip. During his September 26th visit, Agent Waclawik and an assistant also laid the groundwork for the MWRD's criminal investigation by installing an automatic sampling machine inside EPC's production building, at a location dubbed "Station 1-A." The MWRD led EPC to believe that this machine was being installed simply as part of a "routine" inspection program applicable to all regulated companies in the district. App. at A2-3, 13-14.

The machine Waclawik installed retrieved water samples from EPC's plumbing system at regular, periodic intervals. The sampling machine automatically put each of those samples into separate bottles, which were stored in a tray attached to the sampling machine. The tray held ninety-six sample bottles. The samples were taken in minute increments, effectively affording the MWRD the equivalent of twenty-four hour-a-day access to the EPC facility, without a warrant, without an administrative order and without the petitioners' informed consent.

The samples collected from Station 1-A contained no significant amounts of contaminants. Therefore, on October 21, 1992, Agent Waclawik's supervisor, Allen Giedraitis, gained access to the main sewer line under 54th Street in Cicero, Illinois. Here, under a public right-of-way, Agent Giedraitis collected water samples both upstream and downstream from the EPC building in an effort to confirm the allegations in the anonymous tip. Agent Giedraitis did not enter the EPC building to collect these samples. Agent Giedraitis testified that since he was unable to corroborate the anonymous tip

with either the samples collected from Station 1-A or the samples which he collected from the public sewer, he decided to continue the investigation inside EPC's building.

On October 27, 1992, in furtherance of the ongoing criminal investigation, Giedraitis directed Agent Waclawik to return to EPC, again without a search warrant, for the purpose of secretly planting *another* sampling device inside of EPC's building. Knowing that EPC employees believed Station 1-A would be the MWRD's only sampling point inside of the EPC building, Agent Waclawik covertly installed a twenty-four foot extension on the automatic sampler he had previously installed at Station 1-A. This new device — code-named "Station 1ADN1" — created a separate sampling point inside the EPC plumbing system underneath the concrete floor of EPC's building. Agent Waclawik admitted that the purpose of installing this second device was to investigate the existence of the alleged bypass pipe which the tipster had described. Installation of the secret probe was done without a warrant, without an administrative order and without petitioners' knowledge, permission or informed consent. The samples collected at the sampling machine at Station 1-A were actually being taken from the secret Station 1ADN1 and stored in the collection tray for retrieval by the MWRD. App. at A14.

Agent Waclawik subsequently returned to EPC on at least ten separate occasions between October 27 and November 12, 1992, pretending each time that his presence in EPC's building was merely a "routine" event. Agent Waclawik admitted to the trial court, however, that his sole purpose for the repeated searches was to retrieve the sample bottles containing water collected

from the secret extension probe. On each occasion from October 27, 1992 to November 12, 1992, the State concealed the real purpose of the visit. In fact, the MWRD affirmatively lied to EPC, claiming that the purpose of the visits was simply to perform "routine service" of the automatic sampler at Station 1-A. As noted in Waclawik's written investigative reports, whenever EPC employees appeared to be suspicious, Agent Waclawik altered his behavior or let a day or two pass to avoid being caught. By the time the MWRD's covert operation was completed on November 12, 1992, the State had seized 964 sample bottles from EPC's building and had documented detailed observations of EPC's plumbing and electrical systems. App. at A4, 14-15.

On November 13, 1992, *after* completing its series of warrantless searches, the MWRD finally sought and obtained a warrant to search the EPC building. Executing the warrant, state agents once again searched the EPC premises. After escorting several EPC employees to the grand jury to testify, the State sought an indictment of petitioners. The State did not indict petitioners for any significant criminal conduct on the day the warrant was executed, but rather for alleged criminal conduct that had occurred on the days when the 964 secret samples had been collected by the surreptitious sampling probe.

Petitioners moved to suppress all of the evidence seized. Following five days of evidentiary hearings on petitioners' Fourth Amendment claims, the trial court issued its Memorandum Opinion and Order granting petitioners' motion and suppressing all evidence obtained as a result of the repeated warrantless searches. The trial court, relying upon Fourth Amendment interpretations adopted by this Court and courts in Illinois and

New York, specifically found that the MWRD improperly had conducted a criminal investigation under the pretextual guise of "routine" administrative inspections, in derogation of the well-established rules of law announced in *Michigan v. Tyler*, 436 U.S. 499 (1978) and *New York v. Burger*, 482 U.S. 691 (1987). App. at A15, 18-23.

The appellate court declined to follow *Tyler* and *Burger* and reversed. The appellate court instead characterized the facts below in terms of *California v. Greenwood*, 486 U.S. 35 (1988), and found neither a search nor a seizure by the MWRD agents. In effect, the appellate court created a *Greenwood* exception to the *Burger* doctrine to avoid the administrative pretext prohibition of the Fourth Amendment.

REASONS FOR GRANTING THE PETITION

This petition comes before the Court from a case in which State agents admittedly lied to petitioners to gain access to a private building and to conduct a series of surreptitious warrantless searches. Finding that the State of Illinois intentionally violated petitioners' expectations of privacy by using its allegedly "routine" administrative authority as a pretext for the criminal investigation, the trial court suppressed all fruits of the warrantless searches, following *New York v. Burger*. The appellate court, however, reversed by crafting an exception to *Burger* which this Court cannot have intended.

The appellate court's decision below departs sharply from Fourth Amendment authority on warrantless searches and dangerously erodes constitutionally protected privacy interests. The decision below also runs con-

trary to decisions of appellate courts in New York, Ohio and Massachusetts, all of which have interpreted the Fourth Amendment in a manner consistent with *Burger* on strikingly similar facts. In departing from prior Fourth Amendment cases, the court below has created an illogical and unworkable rule of law which will prevent uniform application of the Fourth Amendment.

In essence, the court below has reasoned that the State may rely upon an administrative pretext to gain access to an otherwise inaccessible building if the criminal investigation which the State conducts while inside that building is not a "search" because petitioners supposedly had no expectation of privacy in the place searched under *Greenwood*. The fatal flaw in that logic is that if petitioners truly had no privacy interest in the building, then the use of an unconstitutional pretext to gain access to the building would have been unnecessary. Instead of adopting a rule of law which would avoid such an irreconcilable dichotomy and preserve the integrity of the *Tyler* and *Burger* doctrines, however, the court below held that the supposed absence of a privacy expectation legitimized the pretextual searches. These important constitutional and public policy issues support petitioners' prayer that this Court grant their petition for writ of certiorari.

I. THE DECISION BELOW IS AT ODDS WITH FOURTH AMENDMENT DECISIONS IN THREE OTHER STATES AND WILL LEAD TO INCONSISTENT APPLICATION OF A CONSTITUTIONALLY SECURED RIGHT

The basic rule of Fourth Amendment jurisprudence followed by this Court was set forth definitively in *Katz*

v. United States, 389 U.S. 347 (1967). The rule of law in *Katz* provides that

> The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

Katz, 389 U.S. at 357. This Court also has made clear that an administrative inspection scheme may not be used as a pretext to search for evidence of criminal violations. *Michigan v. Tyler*, 436 U.S. 499 (1978). Nevertheless, the repeated warrantless searches conducted by the State in this case were based on an administrative pretext and done without prior approval, permission or informed consent, or in the exercise of administrative regulation. *See New York v. Burger*, 482 U.S. 691 (1987). The appellate court's decision to condone the State's warrantless searches with the rationalization that the criminal investigation involved neither searches nor seizures runs contrary to accepted constitutional interpretation.

A. The Fourth Amendment Analysis Followed by the Illinois Appellate Court Conflicts with Fourth Amendment Analysis in Three Other States.

The seminal issue is whether an administrative agency charged with the authority to oversee regulation of the public sewer system can use that authority as a pretext for a criminal investigation of sewer uses. In *New York v. Burger*, 482 U.S. 691 (1987) this Court essentially said no. Three other states have followed *Burger* in the en-

suing decade; Illinois now has declined to do so. Thus, the Illinois appellate court's decision not only is contradicted directly by *Burger* itself, but it diverges from the uniform interpretation of *Burger* by state courts in at least three other jurisdictions. The analysis in those decisions highlights the critical error in the appellate court's holding below.

The central premise of the decisions from New York, Massachusetts, and Ohio is that if the State suspects a criminal violation, it may not use an administrative pretext to search private property and circumvent the warrant requirement of the Fourth Amendment. Although those decisions were brought to its attention, the Illinois appellate court chose not to follow *Burger*, and instead read *California v. Greenwood*, 486 U.S. 35 (1988), as an exception to the *Burger* rule. Certiorari should be granted to correct the unique approach adopted by the Illinois court and to harmonize the ruling with the decisions of this Court and the courts in several other states.

In *New York v. deWit*, No. 88-38 slip op. (N.Y. County Ct., Feb. 16, 1989), *aff'd* 550 N.Y.S.2d 820, 156 A.2d 973 (December 20, 1989), the New York Supreme Court, Appellate Division, refused to ignore *Burger's* restrictions on a state agency's pretextual administrative investigation. In *deWit*, defendants were charged with the illegal disposal of pesticides. Prompted by an anonymous "tip," and without a warrant, a state inspector visited defendants' premises and obtained water samples. As a result, defendants were charged with several environmental crimes. Following indictment, the defendants moved to suppress the State's lab analysis results. The trial court granted defendants' motion to suppress and the appellate

court affirmed. *Id.*, slip op. at 14. The *deWit* court compared the facts to those in *Burger* and concluded:

> [T]he *Burger* decision does not stand for the proposition that state officers can enter upon commercial premises, albeit a pervasively regulated business, under the guise of a routine administrative inspection, if there was *prior* suspicion of criminal activity, for the purposes of securing evidence for criminal prosecution.

Id., slip op. at 7-8.

The appellate court below also declined to follow the decision in *Commonwealth v. Krisco Corp.*, 421 Mass. 37, 653 N.E. 2d 579 (1995). The defendants in *Krisco* operated an auto body shop and were accused of illegally disposing of paint waste into a dumpster located on company property behind the shop. The State learned of the disposal via an anonymous tip by a former company employee and commenced surveillance of defendants' facility from a nearby building. Acting on the tip, and on twelve separate occasions thereafter, a State inspector observed and videotaped activities at the rear of defendants' facility without a search warrant. Three months after this surreptitious surveillance began (and immediately after observing defendants placing waste in their dumpster), a State inspector entered the shop and announced she was there to conduct an inspection. As part of her search, the inspector climbed into defendants' dumpster and retrieved discarded cans of paint. The evidence she seized formed the basis for the indictment.

The trial court granted defendants' motion to suppress the evidence seized from the dumpster and held that the warrantless search "could not be justified as an administrative search under a theory of consent to search or as

a search based on exigent circumstances." *Commonwealth v. Krisco*, 421 Mass. at 41. Based on its location and the fact that access to the area containing the dumpster was restricted, the trial judge also disagreed with the state's contention that the defendants lacked a reasonable expectation of privacy in the dumpster that would preclude protection under the Fourth Amendment. *Id.* The trial court specifically found the search "was not a valid administrative search, but rather a criminal investigative search using [the state statute] as a subterfuge to avoid the burden of obtaining a warrant." *Id.*, at n. 3. Relying upon *California v. Greenwood*, the Massachusetts Supreme Court affirmed the trial court's ruling in all respects. *Id.*, at 48.

In *Ohio v. Denune*, 82 Ohio App. 3d 497, 612 N.E.2d 768 (1992), the defendant and his business, Dixie Distributing, were indicted for illegal storage, transportation and disposal of a hazardous waste. The Ohio Environmental Protection Agency ("OEPA") had received an anonymous tip that defendant was going to move a tractor trailer containing PCBs from his warehouse on the eve of a scheduled inspection. To confirm the tip, investigators followed the trailer to a salvage yard more than sixty miles from the business. Once there, OEPA agents located and looked into six *other* defendant-owned trailers containing fifty-five gallon drums. Based on what they had observed in the other trailers, the agents then broke into the newly arrived trailer and found evidence of PCBs and an unlabeled fifty-five gallon drum. Indictments based on evidence seized from all of the trailers followed.

The defendant filed a motion to suppress the seized evidence. The trial court denied defendant's motion to

suppress based in part on the assumption that OEPA's authority to inspect eliminated the need for a search warrant. Defendant appealed his subsequent conviction and ascribed error to the trial court for denying his motion to suppress. The Ohio Court of Appeals reversed. *Denune*, 82 Ohio App. 3d at 504-505. In rejecting OEPA's authority to search, the court found nothing that "can be fairly read to abolish the warrant requirements for searches." *Id.* at 506. Declining to follow the trial court's reasoning, the appellate court noted that "an agency of the state may not be used as a surrogate for the police to obviate the constitutional duty of obtaining a search warrant." *Id.*

The similarities between each of these cases and what occurred at EPC are compelling. The tips, the repeated surveillance, the pretextual administrative search and the failure to obtain a warrant or informed consent all are hallmarks of the factual predicates which are at the heart of the *Burger* doctrine. The decisions in *deWit*, *Krisco* and *Denune* properly applied *Burger*, even in the face of *Greenwood* arguments, and support the reasoned analysis of the trial court and its order suppressing all of the evidence seized.

The appellate court below chose to discuss only one of these cases — *Krisco* — and concluded that Krisco's expectation of privacy in the dumpster outside of its building somehow exceeded EPC's expectation of privacy in the plumbing inside of its building. Contrary to the decisions from its sister states which harmonized *Tyler* and *Greenwood* by following *Burger*, however, the appellate court below relied entirely upon the "garbage" exception of *Greenwood* to remove all constitutional restrictions on the MWRD. Its factually unsupported creation of an

"irretrievably lost" exception to *Burger* goes one step beyond constitutional boundaries and invites state law enforcement officials to bypass established warrant procedures. New York, Massachusetts and Ohio say that this is not what the Fourth Amendment allows. Illinois has sent a contrary signal. Petitioners request this Court to resolve the conflict before two distinct lines of Fourth Amendment jurisprudence develop, one of which will be incorrect.

B. Federal Interpretation of Analogous Fourth Amendment Issues is Consistent with the Trial Court's Finding.

The appellate court's decision also is inconsistent with well-established constitutional guidelines which have been found to apply in analogous situations before this and other federal courts. This Court, as well as the lower federal courts, frequently has held that even seizures of evidence in "plain view" are constitutionally prohibited if the State has no authority to be present in the location from which the evidence is seized. This Court has found that an "essential predicate" for a warrantless seizure under the plain view doctrine is that the searching officer "cannot violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California*, 496 U.S. 128, 136 (1990). The rationale for this rule is that an officer's illegal entry into a private area will not be excused, even if the actual seizure of evidence which the officer takes from that area is otherwise justifiable under the Fourth Amendment.

Here, the MWRD did not have a lawful right to be present in the EPC building to conduct a criminal investigation regarding the "tip" it received. *Horton* and

other decisions interpreting the Fourth Amendment concerning the "place searched" support the majority view law from which Illinois has now departed. *See Soldal v. Cook County*, 506 U.S. 56, 66 (1992) ("in the absence of consent or a warrant permitting the seizure of the items in question, such seizures can be justified only if they meet the probable cause standard and if they are unaccompanied by unlawful trespass") (citations omitted); *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987) (requiring probable cause to seize items found in plain view); *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971) ("the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges"). *See also United States v. Charr*, No. 96-2316, 1998 WL 51293, at *9, n. 6 (6th Cir., February 11, 1998) (because police officers had no lawful right of access to place searched, search and seizure was unlawful). Certiorari should be granted to bring Illinois law back into line with this general rule.

II. THE APPELLATE COURT'S FOURTH AMENDMENT ANALYSIS MISCONSTRUED THE NATURE OF THE STATE'S "SEIZURE" AND THE PETITIONERS' PRIVACY INTEREST IN THE LOCATION "SEARCHED"

Recognizing that the place which the State actually searched, and the place from which the State removed the suppressed evidence, was the EPC building, the trial court found that the State's warrantless searches violated petitioners' objectively reasonable expectation of privacy in that building. App. at A22-A24. In contrast, the appellate court held that the MWRD's warrantless

entries into EPC's building to seize 964 water sample bottles did not violate petitioners' objective expectations of privacy and therefore did not implicate Fourth Amendment concerns. App. at A9. The appellate court's holding, however, flows from an unrealistically narrow and factually incorrect definition of the "place searched" as the public sewer, rather than the room inside the EPC building from which the State actually seized the evidence. The appellate court's rationale also ignores the fact that the MWRD agents literally sneaked into EPC's building to conduct their searches and to seize the bottles which formed the basis for the indictment.

The first element of any Fourth Amendment analysis is to determine whether there has been a "search." A Fourth Amendment "search" occurs "when an expectation of privacy that society accepts as reasonable is infringed." *Maryland v. Bacon*, 472 U.S. 463, 469 (1985), *citing United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also Rawlings v. Kentucky*, 448 U.S. 98, 100 (1980). The second element of a Fourth Amendment analysis is to determine whether there has been a "seizure." A Fourth Amendment "seizure" occurs when "there is some meaningful interference with an individual's possessory interests" in the property seized. *Maryland v. Bacon*, 472 U.S. 463, 469 (1985), *citing United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

The testimony weighed by the trial court demonstrates that the place which the State "searched" was the EPC building, not the public sewer as described by the appellate court. The testimony plainly established that EPC's building was thoroughly explored. In fact, Agent Waclawik confirmed during his testimony that his searches of

EPC's facility had a practically unlimited scope, including tracing wiring systems inside the building, looking through various rooms for electrical switches, looking for evidence of a bypass pipe (using the anonymous informant's sketch as a road map), and seizing from the building 964 bottles containing the previously collected water samples. Those warrantless searches encompassed virtually every area within the EPC building, all of which enjoy Fourth Amendment protection. In contrast, one of the few places that Mr. Waclawik did *not* search during his investigation was the public sewer. That search was conducted by Agent Giedraitis on October 27, and it led him to conclude that a further search inside of the EPC building was preferable to time spent in the public sewers.

Similarly, the evidence "seized" was not "irretrievably" flowing wastewaters as the appellate court apparently assumed, but rather consisted of 964 water bottles sitting in a machine in a private room. The MWRD inspectors gained custody of those bottles (and the water stored in them) by entering EPC's building and physically removing the bottles from EPC's custody and control. Significantly, the MWRD's own Procedural Manual recognizes a company's possessory interest in its water samples by *requiring* that the MWRD offer companies the opportunity to keep at least half of the volume of water in each sample bottle. The MWRD failed to follow its own procedures when MWRD agents took *all* 964 bottles of water collected by the secret probe, concealing the nature of the samples as well as their intent to use the samples in a criminal investigation. The trial court correctly found that the MWRD's seizure, in derogation of its own Procedural Manual, constituted persuasive

evidence that the MWRD was using an "administrative" pretext to avoid its constitutional obligations under *Burger*.

III. *CALIFORNIA v. GREENWOOD* IS NOT AN "EXCEPTION" TO THE *BURGER* DOCTRINE

Until the court below issued its opinion in this case, neither this Court nor any other federal or state court had considered the *Greenwood* "expectation of privacy" line of cases to be an exception to the *Burger* doctrine which flatly prohibits pretextual searches. Indeed, the *Greenwood* and *Burger* doctrines logically arise in mutually exclusive contexts. The *Burger* doctrine applies where officers use deception and administrative pretext to enter an otherwise private, inaccessible and constitutionally protected area. The *Greenwood* analysis, on the other hand, applies when officers search an area that is unrestricted and freely accessible to the general public. The court below has created an unprecedented hybrid theory, however, which treats *Greenwood* as an exception to *Burger*, and which opens the door to a confusing and unworkable line of cases that would erode the constitutional safeguards imbedded in both *Greenwood* and *Burger*.

Not only did the court below incorrectly treat *Greenwood* as an "exception" to the *Burger* doctrine, but it also extended the scope of *Greenwood* far beyond its original bounds. Because it is clear that the "place searched" in this case was not the public sewer but was instead EPC's building, and that the evidence seized was not an "irretrievable" flow of wastewater, but rather the sample bottles, the Illinois appellate court's reliance upon *Green-*

wood was mistaken. *Greenwood* provides that a person who places his garbage on a street curb, freely accessible to the general public, has no objective expectation of privacy in that garbage. *Id.*, at 39-40. The appellate court cites *Greenwood* in support of its conclusion that EPC did not "have a reasonable expectation of privacy in the wastewaters" searched. App. at A12. Yet, even assuming that the bottles seized are analogous to garbage, the tray of sample bottles were located in the equivalent of EPC's kitchen trash bin, not its dumpster (which other states have protected) or its garbage can on the curb (as in *Greenwood*). Unlike the police officers in *Greenwood* who confined their search to the public street, the MWRD agents effectively came into EPC's "kitchen" to retrieve the samples instead of waiting for the garbage to "reach the curb." By doing so, and by entering EPC's building without a warrant, the MWRD violated petitioners' constitutional rights.

The flaw in the appellate court's decision below is highlighted by a hypothetical example based on the *Greenwood* case. First, assume that Greenwood's garbage can on the curb was fed by a construction debris chute attached to the tenth floor of an office building which was being remodeled. As the remodeling project generated waste, the waste would be fed down the chute into the garbage can. Next, assume that the State of California was concerned that Greenwood might be disposing of toxic ceiling tiles, and therefore issued Greenwood a demolition permit conditioned upon the ability to sample the waste that Greenwood sent down the trash chute. Further assume that California installed a sampling machine on the fifth floor of the building to collect the samples. The machine occasionally would retrieve sam-

ples of the debris as it dropped down the chute en route to the garbage can. The samples taken by the machine on the fifth floor were sealed in boxes, returned to the tenth floor, and stored until they could be divided equally between Greenwood and the State for testing. Finally, assume the State secretly entered Greenwood's tenth floor office space where the boxes were stored, and, without a search warrant or prior informed consent, confiscated the sample boxes (including Greenwood's half of the samples) for use in a criminal prosecution.

These modifications to the *Greenwood* fact scenario would bring *Greenwood* in line with this case. Most importantly, they expose the critical difference between the samples which the State seized in this case, and the material in Greenwood's garbage can. EPC's sample bottles were not on a public curb and were not accessible to the public. Indeed, the samples would not even have been accessible to the State had the MWRD agents not lied to gain access to the EPC building. The bottles seized from EPC were *not* "in the garbage can" (*i.e.*, the public sewer), nor were they even on their way down the ten-story trash chute (*i.e.*, the sewer connection pipe) toward the garbage can. Borrowing from the analogy, EPC's bottles were "sitting in the boxes on the tenth floor," safely within the protection of the Fourth Amendment's recognition of legitimate privacy expectations. As this hypothetical illustrates, the appellate court's reliance upon *Greenwood* not only creates an unwarranted exception to the *Burger* doctrine, but it extends the scope of the *Greenwood* doctrine beyond constitutional limitations. Petitioners respectfully suggest that the error can only be corrected by granting the petition for writ of certiorari and reversing the appellate court.

CONCLUSION

Wherefore, for the foregoing reasons, petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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March 3, 1998

FOURTH DIVISION
AUGUST 21, 1997

No. 1-96-1064

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

ELECTRONIC PLATING COMPANY, ROBERT PORCELLI, and HARSHAD PATEL,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County
No. 94-CR-10434
Honorable Eugene Campion, Judge Presiding.

MODIFIED ON DENIAL OF REHEARING

JUSTICE CERDA delivered the opinion of the court:

Defendants, Electronic-Plating Company (EPC) and two company officials, Robert Porcelli and Harshad Patel, were indicted on 22 counts of introducing contaminants into a sewage works from a non-domestic source (415 ILCS 5/12(h); 5/44 (j)(1)(H) (West 1994)), one count of unauthorized use of hazardous waste (415 ILCS 5/44 (d)(1)(A) (West 1994); 35 Ill. Adm. Code, §722.134)), and one count of conspiracy (720 ILCS 5/8-2; 415 ILCS 5/12(h) (West 1994)). Prior to trial, defendants filed a motion to suppress evidence, contending that the evidence recovered by the Metropolitan Water Reclamation District (District) agents had been illegally obtained in violation of the U.S. Constitution's fourth amendment.

Following a hearing, the trial court granted the motion to suppress. On appeal, the State asserts that the trial court erred because (1) EPC lacked a reasonable expectation of privacy in their sewer connection; (2) EPC lacked a possessory interest in the wastewaters that were being irretrievably discharged from its plant; and (3) the search conducted was authorized by a valid statute. For the following reasons, we reverse and remand.

The issue in this case is whether the District conducted a search and seizure under the fourth amendment when it obtained samples of the wastewaters EPC had flushed out into a pipe that was connected to the District's sewerage system.

On June 26, 1992, the District received an anonymous tip from an alleged ex-EPC employee that EPC had installed and was operating an underground by-pass of its pretreatment facility. The informant also sent the District a sketch showing the location of the alleged bypass.

On September 26, 1992, James Waclawik, a pollution control officer, went to EPC pursuant to instructions from District supervisor Allen Giedraitis to investigate the alleged by-pass. Previously, the 1-A sampling station had been set up as EPC's designated sampling point pursuant to the District's statutory authority. Station 1-A was physically located underneath a manhole in a pipe under the concrete floor of EPC's building. The District has a user charge sampling program, which verifies the strength and volume of sewage, industrial waste, and other wastes generated by EPC. Because Waclawik was aware that the 1-A sampling station may not have been providing an accurate sample of the dis-

charge from EPC, he went to EPC to determine whether a by-pass had been put in the line to avoid the District's official sampling point. Typically, the District inspected every company that is regulated under the Sewage and Water Control Ordinance, including EPC, at least once a week.

On September 26, 1992, Waclawik knocked on the side door and was admitted into the premises by an EPC employee. When Waclawik entered the plant, he was directed to the area of the treatment system. Waclawik proceeded to a manhole, station 1-A, which was the sampling point specifically designated by EPC for inspections. There, he discovered a suspicious discolored discharge, so he began to investigate. He encountered Jerry Steward, EPC's maintenance supervisor, who told him that the reason for the discolored discharge was that a valve had been left open by an employee. Waclawik then traced the discolored discharge beyond station 1-A.

After the inspection, Waclawik reported his findings to Giedraitis and prepared a report. He returned to the EPC plant on October 27, 1992, to install a surreptitious probe from station 1A. When he entered the plant, he told company personnel that he needed to service the automatic sampling equipment at station 1A. He did not request permission from EPC personnel to install the second probe because he did not want them to know he would be sending a surreptitious probe 24 feet down the sewer line from station 1A. After he shut down the automatic samplers at station 1A and obtained 99 samples from the surreptitious probe, he noticed that the samples were obviously different than those taken from the

immediate area of station 1A. They appeared to violate the District's Sewage and Waste Control Ordinance.

Between October 27, 1992, and November 12, 1992, Waclawik and other District personnel returned to the EPC site numerous times to obtain samples from station 1A's surreptitious probe. Each time, Waclawik was in full District uniform. Neither the existence of the 24 foot surreptitious probe nor the real reason for its presence was ever revealed to EPC personnel. He took steps to allay EPC's suspicions, including programming the automatic sampler for an anticipated holiday schedule and stopping his activities when he became aware of being followed by an EPC employee. Occasionally, his activities were interrupted by the unexpected arrival of EPC employees. Neither Waclawik nor the other District employees sought or obtained search warrants for any of the visits.

Waclawik submitted the samples for analysis and reported his findings to his superiors. Giedraitis directed that EPC not be notified of the covert investigation. Waclawik and other District employees returned to EPC 10 times over the next two weeks to gather more samples. On November 10, 1992, a search warrant was issued on the basis of Waclawik's affidavit.

The trial court granted EPC's motion to suppress. In its February 23, 1996, written order and opinion, the court found that the State's argument, that EPC did not have a reasonable expectation of privacy in the wastewaters, was irrelevant because the minimized privacy interests of commercial establishments are taken into account in the administrative search exception to the warrant clause. The court ruled that EPC had a suffi-

cient expectation of privacy to trigger the protection of the fourth amendment.

The court also determined that the District's warrantless search did not fall under any of the recognized exceptions of the warrant requirement. The court decided that the Colonnade-Biswell doctrine, which permits warrantless administrative searches of pervasively regulated industries, did not apply because the electronic plating industry is not pervasively regulated. In addition, the court held that the ordinance permitting the inspections does not authorize or justify warrantless searches because it does not specifically limit the time, place, and scope of the administrative searches. Finally, the court stated that the District acted unreasonably by using its administrative authority to conduct a criminal investigation. The court did not find the ordinance unconstitutional.

The issue is whether the motion to suppress was improper. The facts and credibility of the witnesses are not at issue because the relevant evidence of what actually occurred was not disputed. Therefore, it is a question of law whether a motion to suppress should be granted, and this court will consider the question *de novo*. *People v. Abney*, 81 Ill. 2d 159, 168, 407 N.E.2d 543 (1980); *People v. Patterson*, 267 Ill. App. 3d 933, 940, 642 N.E.2d 866 (1994).

The record shows that there is no dispute about the nature and purpose of the District's inspections. While conducting routine maintenance of the automatic sampler installed at station 1A, the District was at the same time investigating anonymous criminal allegations by collecting evidence from a different sampling point,

which was intentionally concealed by the District. Because the samples were taken automatically in small increments, the District was able to collect samples 24 hours a day.

We must first determine whether the District's actions constituted a search and seizure under the fourth amendment. If a fourth amendment search and seizure occurred, a warrant was required unless an exception applies. If this case involves a closely regulated industry, the warrantless inspection would be reasonable under the administrative inspection exception if three criteria were met: (1) the regulation authorizing the inspection must be written pursuant to a substantial government interest; (2) the warrantless inspection must be necessary to further the regulatory scheme; and (3) the statute must provide for a sufficiently regular and certain application as an adequate substitute for a warrant. *New York v. Burger*, 482 U.S. 691, 701-02, 96 L. Ed. 2d 601, 613-14, 107 S. Ct. 2636, 2643-44 (1987).

The State asserts that we do not have to consider the exception because the fourth amendment does not apply. The State contends that EPC did not have a reasonable expectation of privacy in the sewer connection searched or a possessory interest in the wastewaters seized. The State characterizes the premises searched as the connection to the public sewer system under EPC's building, not the building itself. To support its argument, the State relies on *Grigoleit, Inc. v. Board of Trustees of Sanitary Dist.*, 233 Ill. App. 3d 606, 611, 599 N.E.2d 51 (1992), but that case was expressly not a fourth amendment case because there was no actual search. The State also argues that no seizure occurred pursuant to

the fourth amendment because the wastewaters seized had been flushed into the public sewer system.

The fourth amendment, which protects against unreasonable searches and seizures, applies to commercial premises. *Burger*, 482 U.S. at 699, 96 L. Ed. 2d at 612, 107 S. Ct. at 2642; *U.S. v. Jacobsen*, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 94, 104 S. Ct. 1652, 1656 (1984); *People v. Janis*, 139 Ill. 2d 300, 109, 565 N.E.2d 633 (1990). A fourth amendment search occurs when an expectation of privacy that society recognizes as reasonable is infringed. *Jacobsen*, 466 U.S. at 113, 80 L. Ed. 2d at 94, 104 S. Ct. at 1656. Although there is no dispute that EPC had a subjective expectation of privacy in its sewer connection, that does not give rise to fourth amendment protection unless society is prepared to recognize that expectation as objectively reasonable. *California v Greenwood*, 486 U.S. 35, 39-40, 100 L. Ed. 2d 30, 36, 108 S. Ct. 1625, 1628 (1988); *Jacobsen*, 466 U.S. at 113, 80 L. Ed. 2d at 94, 104 S. Ct. at 1656; *Janis*, 139 Ill. 2d at 309. Whether a search is reasonable depends on the facts and circumstances giving rise to the search as well as the nature of the search itself. *King v. Ryan*, 153 Ill. 2d 449, 457, 607 N.E.2d 1154 (1992). If the inspection does not intrude on a legitimate expectation of privacy, there is no search subject to a search warrant. *Illinois v. Andreas*, 462 U.S. 765, 771, 77 L. Ed. 2d 1003, 1010, 103 S. Ct. 3319, 3324 (1983). The determination must be made by balancing the intrusion on the fourth amendment privacy interests against the promotion of legitimate governmental interests. *Delaware v. Prouse*, 440 U.S. 648, 654, 59 L. Ed. 2d 660, 667-68, 99 S. Ct. 1391, 1396 (1979).

In this case, we do not think that EPC had an objectively reasonable expectation of privacy in the wastewaters contained in the sewer connection that was searched. Therefore, there was no search subject to a search warrant. *Andreas*, 462 U.S. at 771, 77 L. Ed. 2d at 1010, 103 S. Ct. at 3324. Not only does the owner of commercial premises in a closely regulated industry have a reduced expectation of privacy (*Burger*, 482 U.S. at 702, 96 L. Ed. 2d at 613, 107 S. Ct. at 2643), but there is a strong public policy against water pollution. 70 ILCS 405/2(c) (West 1994).

A system for waste disposal and sewage treatment has long been regarded as necessary for public health. *Chicago Allis Mfg. Corp. v. Metropolitan Sanitary Dist.*, 52 Ill. 2d 320, 324, 288 N.E.2d 436 (1972). Industrial wastes impose a special burden on the District's facilities in comparison with residential wastes, and the disposal of waste obviously poses a potential hazard to public health. *Chicago Allis Mfg. Corp.*, 52 Ill. 2d at 324. The provisions of the Sewage and Waste Control Ordinance are designed to deter anyone from introducing contaminants into the public sewer system by providing a system for monitoring the user's waste discharges.

When EPC discharges industrial wastewaters into the public sewer system, it is subject to the provisions of the Metropolitan Water Reclamation District Act (70 ILCS 2605/1 *et seq.* (West 1994)) and the Metropolitan Water Reclamation District of Greater Chicago Sewage and Waste Control Ordinance. Article I of the ordinance provides that its purpose is "the protection of the public health and safety," which is carried out by "abating and preventing pollution through the regulation and control of the quantity and quality of sewage, industrial wastes,

and other wastes admitted or discharged into the sewerage treatment facilities and waters under the District's jurisdiction."

EPC was entitled to use the public sewer system on a permissive basis only. As a general rule, a permit to connect to public sewers is in the nature of a license only and does not create a vested right in such a connection. *LaSalle National Bank & Trust Co. v. City of Chicago*, 128 Ill. App. 3d 656, 665, 470 N.E.2d 1239 (1984). Permission to use the public sewer system was conditioned on compliance with the Act and ordinance, which requires EPC to provide the District with sampling stations. Although the District sampled wastewaters 24 feet from station 1A, a location farther than the immediate area of the designated sampling station, station 1A, we do not find the additional sampling to be unreasonable. EPC was required to allow the District to take samples from a designated control manhole during reasonable hours, and the District took samples from the designated control manhole using a probe 24 feet downstream inserted from station 1A in the same sewer line as station 1A.

Given the purpose of the ordinance, EPC did not have an objectively reasonable expectation of privacy in the sewer connection below its property. One who discharges waste into the public sewer system cannot have an objectively reasonable expectation of privacy in the pipe through which those discharges flow. Wastewater discharges by EPC "constitute a series of acts performed upon land in which it possesses no estate or interest." *Grigoleit, Inc. v. Board of Trustees*, 233 Ill. App. 3d 606, 612. To be permitted to use the public sewer system, the user must allow the District to periodically sample the

wastewater discharges emanating from its premises. The District acted in accordance with the purposes of the ordinance. To enforce the purposes of the ordinance, the District must be allowed to monitor a user's wastewater discharges from a point on the user's premises before those discharges commingle with the discharges of other users. Subsections 1 and 2, Article IV, MWRD Sewage and Waste Control Ordinance.

The sewer connection in this case differs from the search of the dumpster in *Commonwealth v. Krisco Corp.*, 421 Mass. 37, 653 N.E.2d 579 (1995), one of the cases on which EPC relies. In *Krisco Corp.*, the dumpster was located in an alley adjacent to the business behind closed gates and was intended for the exclusive use of the business. *Krisco Corp.*, 421 Mass. 37. While the expectation of privacy in the dumpster was objectively reasonable by society's standards, EPC's expectation of privacy in the sewer connection was not objectively reasonable. If EPC's pipe had never been connected to the public sewer system, EPC would have had an objectively reasonable expectation of privacy in the pipe and its contents. However, once EPC's pipe was connected to the District's public sewer system, any expectation of Privacy in the wastewater discharge contained in that pipe became objectively unreasonable. The wastewaters flushed into the pipe became a part of the public sewer system.

We also find that a fourth amendment seizure did not occur because there was no meaningful interference with EPC's possessory interests in the wastewaters seized. *Soldal v. Cook County*, 506 U.S. 56, 61, 121 L. Ed. 2d 450, 458, 113 S. Ct. 538, 543 (1992). EPC did not have a possessory interest in the wastewaters that was irre-

trievably discharged into the public sewer system. Once the wastewaters entered the sewer pipe, it no longer was possessed by EPC. The wastewaters being discharged through the sewer pipes can be compared to the trash left for collection in *Greenwood*, 486 U.S. at 39-40, 100 L. Ed. 2d at 36-37, 108 S. Ct. at 1628-29. Although the wastewaters was not visible to the public in the same way as the trash was, EPC sufficiently exposed the wastewaters to the public to defeat its claim to fourth amendment protection. *Greenwood*, 486 U.S. at 40, 100 L. Ed. 2d at 36, 108 S. Ct. at 1628. There is no seizure to invoke constitutional protection if one voluntarily transfers any possessory interest he may have had in the property. *Maryland v. Macon*, 472 U.S. 463, 469, 105 S. Ct. 2778, 86 L.Ed. 2d 370 (1985).

As stated in *Greenwood*, "an expectation of privacy does not give rise to Fourth Amendment protection unless society is prepared to accept that expectation as objectively reasonable." *Greenwood*, 486 U.S. at 39-40, 100 L.E.2d at 26, 108 S. Ct. at 1628. In *Greenwood*, the court concluded that the defendants exposed their garbage to the public sufficiently to defeat their claim to fourth amendment protection. The *Greenwood* court reasoned that defendants, "having deposited their garbage 'in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it,' [cite omitted] respondents could have no reasonable expectation of privacy in the inculpatory items that they discarded." *Greenwood*, 486 U.S. at 40-41, 100, L. Ed. 2d at 36-37, 108 S. Ct. at 1628-29.

Just as the plastic garbage bags left on the side of a public street were readily accessible to members of the

public, the wastewaters were readily accessible to the public sewer system as soon as they were discharged. Having deposited the wastewaters in an area particularly suited for public inspection for the express purpose of having strangers take it, EPC could have had no reasonable expectation of privacy in the wastewaters that it discarded. Greenwood, 486 U.S. at 40-41, 100 L. Ed. 2d at 36-37, 108 S. Ct. at 1628-29. As a result, the District's collection of the wastewaters was not a seizure for the purposes of the fourth amendment.

Because there was no fourth amendment search or seizure, we need not consider the administrative inspection exception of the warrant clause. Accordingly, we reverse the circuit court's judgment and remand this cause for further proceedings.

Reversed and remanded.

McNamara, J., and Burke, J., concur.

[Filed February 23, 1996]

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
v.	)	No. 94 CR 19434 95 CR 579
ELECTRONIC PLATING COMPANY, ROBERT PORCELLI, and HASHAD PATEL, Defendants.	)	(Consolidated)

MEMORANDUM OPINION AND ORDER

Defendants have moved this court to suppress evidence seized pursuant to a purportedly illegal search. Defendants are charged with the illegal discharge of industrial contaminants into the sanitary sewer system. The facts are largely undisputed and they, along with the testimony elicited at the hearing on the Motion to Suppress, are fairly summarized as follows.

In June, 1992, the Metropolitan Water Reclamation District ("MWRD") received a complaint from an "informant" that defendant Electronic Plating Company ("EPC") had installed and was operating an underground bypass of its pretreatment facility. On or about September 26, 1992, James Waclawik, a pollution control officer with MWRD, went to the EPC facility in Cicero and, with the permission of EPC personnel, installed a dedicated automatic sampler into the sewer line. MWRD characterizes this installation as part of an MWRD program to install such samplers at various sites

throughout the district, combined with an annual inspection conducted pursuant to the District's Sewage and Waste Control Ordinance. Waclawik testified that all plating companies in the district were subject to such sampling and inspection on an annual basis pursuant to the Ordinance.

On or about October 27, 1992, Waclawik installed what MWRD terms a "surreptitious probe" at a second location, further down the sewer line. This probe effectively extended the original sampler 27 feet. The purpose of the second probe was undisputedly to obtain samples from a second location without the knowledge of EPC personnel. Waclawik did not request permission of EPC personnel to install this second probe and, in fact, "did not wish them to know he was sampling from that location." He did not seek or obtain a search warrant.

Between October 27 and November 12, 1992, Waclawik and other MWRD personnel returned to the EPC site numerous times and obtained samples from the second, "extension" probe, never revealing to EPC personnel either the existence of the probe or the true purpose of their presence on the premises. Neither Waclawik nor the other MWRD employees sought or obtained search warrants for these visits to EPC. Waclawik testified that his activities were occasionally interrupted by the unexpected (and undesired) arrival of EPC employees. He further testified that he took steps to allay EPC's suspicions, such as programming the automatic sampler for anticipated weekend schedules, that he ceased his activities at one point when he became aware that he was being "followed" by an EPC

employee, and that he concealed from EPC his attempts to verify the allegations of the informant's complaint.

After MWRD had gathered "secret" samples for approximately two weeks, it delivered to the State's Attorney's office the results of its collection of information. The State's Attorney then convened grand jury proceedings and obtained and executed a search warrant, in that order. As a result of the grand jury proceedings, defendants were indicted for "Unauthorized use of Hazardous Waste." The evidence presented to the grand jury consisted primarily of the samples obtained from the second, surreptitious probe at the EPC plant.

DEFENDANTS' MOTION TO SUPPRESS

The court has previously denied defendants' Motion to Dismiss Indictments in their Entirety. The arguments made in defendants' Memorandum of Law in support of their dual motion apply equally to the suppression issue and, therefore, will be addressed here. The thrust of both motions is that the warrantless search(es) performed by the MWRD violate the Fourth Amendment because none of the recognized exceptions to the search warrant requirement apply.

Defendants argue that the *Colonnade-Biswell* Doctrine permits warrantless administrative searches only in limited circumstances. Pursuant to that doctrine, defendants maintain, a warrant is not needed to perform an administrative search when the party being searched is a member of a closely regulated industry and when the legislation relied upon to authorize the search is so highly specific and regular in application that it provides an "adequate substitute for a search warrant."

Neither of those conditions, defendants maintain, is met here.

Next, defendants argue that a governmental body is not permitted to use even an otherwise permissible administrative search as a "ruse" to investigate or uncover criminal conduct. Defendants cite *New York v. deWit*, No. 88-38 (N.Y. County Ct., Feb. 16, 1989) as persuasive authority on this point. Defendants argue that the New York court in *deWit*, under facts strikingly similar to those here, suppressed evidence seized during a warrantless administrative search (and the fruits thereof) *because* the search was based on suspicion of criminal activity. They also cite *People v. Bessler*, 191 Ill. App. 3d 374, 548 N.E.2d 52 (2d Dist. 1989), in which a municipal housing inspector and a police officer, under the guise of performing a routine inspection of property, forcibly entered a padlocked garage in search of evidence to corroborate a tip of illegal activity. Upon finding such evidence, the officer obtained and executed a search warrant. The Appellate Court reversed the trial court's denial of defendant's motion to suppress, holding that the initial search which formed the basis for the search warrant was unlawful; the initial, purportedly administrative search required a search warrant.

THE STATE'S RESPONSE

The state offers three legal responses to the defendants' motion. First, it argues that, under *Illinois v. Krull*, 480 U.S. 340 (1987), evidence obtained by police officers acting in "objectively reasonable reliance" upon laws authorizing warrantless searches is not subject to the exclusionary rule even if such law is found unconsti-

tutional. The state contends that Waclawik acted in objectively reasonable reliance upon the MWRD's Sewage and Waste Control Ordinance and its enabling legislation, both of which are "facially valid" and permit warrantless administrative searches such as were undertaken here.

Second, the state argues that the warrantless searches did not violate a reasonable expectation of privacy on the part of the defendants. Citing *Grigioleit v. Board of Trustees*, 233 Ill. App. 3d 606, 599 N.E.2d 51 (4th Dist. 1992), the state argues that because EPC was a mere licensee with respect to the sewer system, it had no constitutionally protected interest in the property. In addition, the state contends that defendants "abandoned" the waste which was the subject of the warrantless search and, thus, relinquished any reasonable expectation of privacy in that material.

The state makes an additional, separate argument as to defendants Porcelli and Patel. It argues that these individual defendants have not demonstrated any personal proprietary interest in the property searched or seized. Therefore, the state claims, because neither Porcelli nor Patel have shown any violation of their Fourth Amendment rights, the evidence so seized should not be suppressed as to them.

Third, the state argues that the defendants consented, at least impliedly, to the searches performed by MWRD personnel. The state bases its implied consent theory on defendants' purported knowledge of their right to object to Waclawik's presence and their failure to so object to installation of the extension probe. The state argues that under *See v. City of Seattle*, 387 U.S. 541 (1967),

there is no requirement that an administrative warrant be obtained until an objection is made to the lack of a warrant.

DISCUSSION

The Fourth Amendment prohibition against unlawful searches and seizures requires a search warrant for administrative searches. *New York v. Burger*, 482 U.S. 691 (1987); *Marshall v. Barlow's*, 436 U.S. 307 (1978). The U.S. Supreme Court has recognized and the Illinois and lower federal courts have interpreted, several exceptions to this general rule. *See, e.g., Colonnade Corp. v. U.S.*, 397 U.S. 72 (1970); *U.S. v. Biswell*, 406 U.S. 311 (1972); *People v. Madison*, 121 Ill. 2d 195, 520 N.E.2d 374 (1988); *Bionic Auto Parts & Sales v. Fahner*, 721 F. 2d 1072 (7th Cir. 1982). It is undisputed here that the MWRD conducted its search and seized evidence without a warrant. The issue, therefore, is whether its actions fall under any of the recognized exceptions to the warrant requirement. The court concludes they do not.

The primary exception to the warrant requirement, known as the Colonnade-Biswell Doctrine, permits warrantless administrative searches of pervasively regulated industries where 1) there is a "substantial government interest that informs the regulatory scheme pursuant to which the inspection is made," 2) the warrantless searches are "necessary to further the regulatory scheme", and 3) "the statute's inspection program, in terms of the certainty and regularity of its application, [provides] a constitutionally adequate substitute for a search warrant." *New York v. Burger*, 107 S. Ct. at 2644.

This exception is inapplicable to the instant case. The regulatory scheme suggested here as justification for warrantless searches does not purport to "pervasively regulate" the electronic plating industry. The regulatory schemes subject to Colonnade-Biswell analysis uniformly pertain to a particular type of business or industry. In *Colonnade*, for example, the Court found a long history of regulation of the liquor industry and corresponding authority of Alcohol, Tobacco, and Firearms agents to conduct inspections under "liquor laws". Likewise, in *U.S. v. Biswell*, the Gun Control Act of 1968 was found to be the regulatory scheme to which the firearms industry was subject. *See also, Donovan v. Dewy*, 452 U.S. 594 (1981) (Federal Mine Safety and Health Act of 1977 applicable to mine inspections); *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F. 2d 1072 (7th Cir. 1983) (Illinois Vehicle Code as authorizing warrantless searches of business premises of automotive parts dealers, scrap processors, and parts rebuilders). The MWRD Sewage and Waste Control ordinance does not purport to effect a comprehensive statutory scheme tantamount to a substitute for a search warrant in this particular industry. Nor does the MWRD suggest an additional or alternative regulatory framework. The court, therefore, need not determine whether the Ordinance meets the Colonnade-Biswell exception to the warrant requirement.

Even if the Ordinance were found to be the sort of pervasive regulatory framework contemplated by the Doctrine, the provision of the Ordinance permitting inspections is not of the type which either authorizes or justifies warrantless searches in the circumstances of this case. As the Seventh Circuit observed in *Bionic*

Auto Parts, "Even in closely regulated industries, the inspection provisions still must be tailored to the state's proper objectives, and they must minimize the dangers inherent in the unbridled exercise of administrative discretion." 721 F. 2d at 1079. In that case, the court found constitutional that portion of the Illinois Vehicle Code authorizing warrantless administrative searches of automotive parts dealers, scrap processors, motor vehicle dealers, and others in related businesses. The court found that the statute and regulations promulgated thereunder limited the discretion of state officials sufficient to satisfy constitutional concerns. The statute "delineates specifically what is to be searched," "describes how searches are to be conducted," and limits the number of such inspections that may be conducted within a six-month period. *Id.*, at 1080. The Ordinance here provides no such limits and, in fact, does not by its terms authorize the sort of "inspection" conducted by the MWRD in this case. Section 3 of the Ordinance provides, in pertinent part, "Representatives of the District may, during reasonable hours of all working shifts of the person, enter upon the premises of each person subject to this Ordinance for the purpose of installing, maintaining and inspecting measurement or sampling devices or facilities, for conducting necessary measuring, gauging and sampling operations . . . to determine compliance with this Ordinance." Section 5 further provides "Any person subject to this Ordinance who has a history of bypass or access to premises violations of this Ordinance, or a history of discharge violations of this Ordinance, may be directed by the General superintendent to provide a means of unrestricted access, acceptable to the District, for the purpose of sampling at any control

manhole or sampling chamber required under Article IV." Neither of these provisions defines the time, place, manner or frequency of warrantless inspections, as does the Vehicle Code provision, nor do they contemplate warrantless searches for purposes other than determining compliance. The Ordinance does not authorize MWRD personnel to conduct "investigations" based on tips of illegal activity.

The second exception, urged by the State as applicable here, is the "good faith" exception enunciated in *U.S. v. Leon*, 468 U.S. 897 (1984) and expanded in *Illinois v. Krull*, 480 U.S. 340 (1987). The rationale of *Krull*, upon which the State primarily relies, is that: "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *People v. Madison*, 121 Ill. 2d 195, 207 (7th Cir. 1988), quoting *Illinois v. Krull*, 480 U.S. at 349-50. The State's reliance on *Krull* is misplaced. The good faith exception exempts from the exclusionary rule evidence seized pursuant to a search undertaken in "good faith" reliance on a statute which is subsequently found unconstitutional. Any claim by the MWRD to have acted in "good faith" upon its own ordinance is belied by the surreptitious manner in which it conducted investigation.

Even if such good faith were reasonably imputed to Waclawik on behalf of the MWRD, the Ordinance itself

does not authorize such an investigation. The State's argument here mirrors the position rejected by the Illinois Supreme Court in *People v. Madison*. There, the State argued that an officer's subjective reliance on his own interpretation (or misinterpretation) of a statute should satisfy the good faith exception. The Supreme Court held, "the officer's good faith alone is not sufficient to validate the search and seizure; the officer must also be acting on the authority of a seemingly valid warrant or statute. Here, there is no such reliance, but quite the opposite." 121 Ill. 2d at 195.

The State's contentions and citations regarding the defendants' lack of an expectation of privacy in the waste disposed via the sewer system are largely irrelevant. The minimized protectible privacy interests of commercial establishments are taken into account in the jurisprudence regarding warrantless administrative searches. "An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable . . . An expectation of privacy in commercial premises, however, is different from, and indeed less than a similar expectation in an individual's home." *New York v. Burger*, 107 S. Ct. at 2642. That such privacy interests are diminished does not mean they are eliminated. *Grigoleit v. Board of Trustees*, 233 Ill. App. 3d 606, 599 N.E.2d 51 (4th Dist. 1992), does not alter this conclusion, nor did the court there consider a situation in which the samples were obtained from the defendant's own property. The defendants here had a sufficient expectation of privacy to trigger the protection of the Fourth Amendment. As to the individual defendants, Porcelli and Patel, the State seems to seek to limit their privacy

rights to matters personal to them. The State has cited and the court has discovered no authority for this proposition. The requisite possessory interest has been demonstrated so as to entitle them to Fourth Amendment protection as well.

The court finds no support in the record for the State's contention that the defendants "consented," expressly or impliedly, to the MWRD's warrantless incursions and carefully concealed evidence-gathering operation. The court is unaware of any authority requiring an "objection" before the search warrant requirement comes into play, nor has any been cited. The evidence in the record of the lengths to which Waclawik went to conceal his activities and his true purpose on the premises preclude any finding of a consent by any of the defendants to a search of which they were unaware.

The MWRD's characterization of the "inspections" here as "routine" notwithstanding, the only conclusion supported by the record is that MWRD, acting on a tip of illegal waste disposal, determined to undertake a criminal investigation on its own. It is well-settled that units of government may not use their administrative authority to circumscribe the protections afforded the objects of criminal investigation. "One of the fundamental principles of administrative searches is that the government may not use an administrative inspection scheme as a pretext to search for evidence of criminal violations." *People v. Madison*, 121 Ill. 2d at 209. The court finds that none of the exceptions to the warrant requirement are applicable here. The evidence which is the fruit of the warrantless search and seizure conducted by the MWRD must, therefore, be suppressed.

WHEREFORE, Defendant's Motion to Suppress is granted.

ENTER: _____
Hon. Eugene Campion

DATE: February 23, 1996

(*Letterhead of*)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

December 3, 1997

Mr. W. Scott Nehs
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive
Suite 3000
Chicago, IL 60606-1229

No. 83942 – People State of Illinois, respondent, v. Electronic Plating Company et al., petitioners. Leave to appeal, Appellate Court, First District.

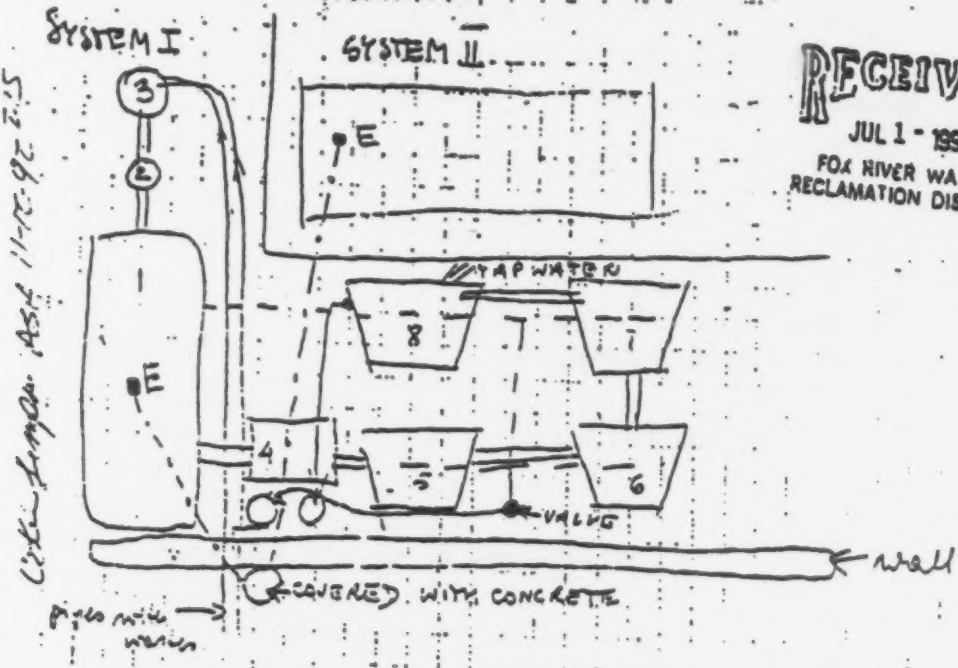
The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 1997.

9254.7586

FROM ~~ATTN~~: RICK MANNER, FRWD Fm 10 708 742 0193

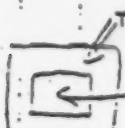
RECEIVED
JUL 1 - 1992
FOX RIVER WATER
RECLAMATION DISTRIC



E - HIDDEN ELECTRIC VALVE ON THE BOTTOM OF TANKS

-·-·- PIPES WITH WASTES, WHICH ARE UNDERGROUND (INVISIBLE)
- - - PIPES UNDER TANKS (VISIBLE)
═══ "NORMAL" PIPES

B - ELECTRIC BASE WITH SWITCH FOR HIDDEN ELECTRIC VALVES ON THE SIDE.



TANK # 8 VIEW FROM THE TOP

312 - 751 - 5048

Thank you.
James M. MacBeath
COMPLAINANT

Exhibit A

BEST AVAILABLE COPY